IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 6, 2007 Session

TROY ALLEN CLARK v. JENNIFER DAWN CLARK

Direct Appeal from the Circuit Court for Davidson County
No. 03D-2344 Carol Soloman, Judge

No. M2006-00934-COA-R3-CV - Filed on May 18, 2007

This is the second appeal of a property division following the dissolution of an almost thirteen-year marriage. After a remand on the issue of the division of marital property, Troy Allen Clark (Husband) contends that the trial court divided the marital estate in an inequitable fashion and that it erroneously increased the value of real property awarded to him by refusing to subtract likely capital gains taxes from its market value. Husband also challenges the trial court's post-remand award to Jennifer Dawn Clark (Wife) of half the attorney's fees incurred for the preparation of a Qualified Domestic Relations Order [QDRO] that was ordered in the divorce proceeding. We affirm in part, reverse in part, and remand for entry of judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part; Reversed in part; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Andrew M. Cate, Nashville, Tennessee, for the appellant, Troy Allen Clark.

Alan D. Johnson and Mary Arline Evans, Nashville, Tennessee, for the appellee, Jennifer Dawn Clark.

OPINION

Troy Allen Clark (Husband) and Jennifer Dawn Clark (Wife) divorced after almost thirteen years of marriage. By an order entered on June 24, 2004, the trial court declared an absolute divorce, designated Wife as the primary residential parent of their son, divided the marital property (including Wife's retirement account by way of a QDRO), denied Husband's request for alimony, and ordered the parties to pay their own attorney's fees. Husband appealed from this order and successfully challenged the lower court's classification of a newly built residence as Wife's separate property and the valuation of their three (3) vehicles. In an opinion filed September 13, 2005, the middle section of this Court modified the valuations and reversed the lower court's finding that the residence on

Ridge Crest Lane (the Ridge Crest property) was Wife's separate property. *Clark v. Clark*, No. M2004-01824-COA-R3-CV, 2005 WL 2230198, at *6 (Tenn. Ct. App. Sept. 13, 2005). It remanded the case, however, on the issue of the division of the marital estate. *Id.*

The Division of Marital Property on Remand

On remand, the lower court divided the marital estate[1] including two homes with net values totaling one hundred sixty four thousand dollars ($164,000), bank accounts and cash totaling approximately eighteen thousand seven hundred seventy-two dollars ($18,772), retirement accounts totaling approximately forty-four thousand fifteen dollars ($44,015), and three vehicles valued at approximately twenty-three thousand four hundred dollars ($23,400). The residential real property comprised the Ridge Crest property, with ninety-nine thousand dollars ($99,000) in equity, and a rental property on Dutchman Drive (the Dutchman property), with sixty-five thousand dollars ($65,000) in equity.[2]

In the remand hearing conducted on March 27, 2006, the only new admissions of evidence pertained to the parties' current annual income. Wife testified to earning approximately sixty-five thousand dollars ($65,000) per year, and Husband testified to earning approximately eight thousand nine hundred dollars ($8,900) per year. Although charged with the task of dividing the marital estate (without limitation) on remand, the trial court divided only the real property and the vehicles. The trial judge had roughly halved[3] the cash and retirement funds in the first order and did not revisit the division of those assets on remand. Instead, the order first reclassified the Ridge Crest property as marital property and restated the modified values of the vehicles. And, considering those modifications in light of the whole record, the trial judge conformed to the original disposition of the real property. Wife received the Ridge Crest property along with its mortgage, and Husband received the Dutchman property, also encumbered by a mortgage. The court reasoned that

> it is equitable to make an unequal division of the parties' real property . . . because the Wife needs the [Ridge Crest] home to support and provide for the parties' one (1) minor child, especially considering that the Husband is so underemployed and his

[1] The record does not expressly reveal the existence of any separate property owned by Husband or Wife. Although some accounts bore the name of one party or another, it appears that both parties considered the accounts to be marital property. Because the lower court awarded to Husband and Wife the accounts listed in their respective names, it is unclear whether it considered them to be separate or marital property. We follow the characterization provided by Husband and Wife and will therefore presume all accounts to be marital property.

[2] As to the Dutchman property, the parties stipulated to a value of $64,486 prior to trial. The trial court on remand, however, rounded the figure to $65,000. As both parties use this figure throughout their arguments and do not take issue with it, this opinion will refer to the stipulated value as sixty-five thousand dollars ($65,000).

[3] There is a discrepancy of roughly four thousand five hundred dollars ($ 4,500), or four percent (4%), between the amounts received by the parties. Three thousand three hundred sixty four dollars ($3,364) of the discrepancy is attributable to Husband's liquidation of an IRA account just prior to the divorce proceeding, a measure he alleged was necessary for paying his attorney and meeting basic living expenses.

child support obligation is low. Further, the Dutchman's Drive property awarded to Husband is income-producing rental property.

The order also specifically referred to the Dutchman property's value of sixty-five thousand dollars ($65,000) and declined to reduce that value to reflect "tax consequences" due to the lack of competent proof at trial. The trial court also adhered to its original division of vehicles. It awarded the eleven-year old pickup truck and an inoperable Porsche to Husband and the new Nissan to Wife. Yet, it ordered Wife to make a series of equalizing cash payments totaling six thousand three hundred dollars ($6,300) to Husband to account for the difference in value. The trial court entered its order on April 5, 2006.

Overall, Husband received net assets valued at approximately one hundred five thousand eight hundred seventeen dollars ($105,817), or forty-two percent (42%), of a net marital estate totaling approximately two hundred fifty thousand two hundred twenty-four dollars ($250,224). On the other hand, the trial court awarded Wife approximately fifty-eight percent (58%), or one hundred forty-four thousand four hundred six dollars ($144,406).[4]

The Post-Remand Award of Attorney's Fees

In addition to challenging the lower court's second division of marital property, Husband asserts that the lower court erred when, two months after the entry of the order on remand, it entertained and granted Wife's motion to assess attorney's fees for the preparation of a QDRO that was ordered in the divorce proceeding some two years before. The final decree of divorce addressed all issues pertaining to the divorce, including property division, child custody, alimony, and attorney's fees. The second order addressed narrower issues on remand: the vehicle valuations, the division of the real property and the vehicles, and attorney's fees. Husband challenges the third and final order, which granted to Wife half of the attorney's fees associated with the QDRO preparation.

At the conclusion of the divorce proceeding, the trial court ordered the preparation of a QDRO and directed Wife's attorney to draft both the final decree of divorce and the QDRO. Entered on June 24, 2004, the final decree provided that "the parties . . . are . . . each to be solely and separately responsible for their own attorney fees."

Approximately six (6) months after the middle section of this Court filed its opinion in the first appeal, Wife's attorney filed a motion to establish a lien for attorney's fees. Eight (8) days later, on March 16, 2006, Wife filed a motion to assess attorney's fees incurred as a result of the QDRO preparation undertaken by her attorney. Simultaneously, she submitted the QDRO to the court and moved for its entry. The remand hearing occurred on March 27, 2006, and the court entered both

[4] It appears that both parties have overstated the value of the marital estate and of Wife's share by five hundred dollars ($500) by neglecting to adjust a value that was modified by this Court in the first appeal. This Court modified the trial court's valuation of the Nissan from ten thousand dollars ($10,000) to eighteen thousand dollars ($18,000). The discrepancy seems to come from the parties' original equity valuations of eighteen thousand five hundred dollars ($18,500) for the Nissan, which apparently was not reduced to the modified value.

the order on remand and the QDRO on April 5, 2006. The order on remand did not address the QDRO or the division of retirement accounts. It did provide, however, that "the parties shall each pay their own attorney fees for representation in this cause."

The hearing on the attorney's fees took place on June 9, 2006. The only evidence then submitted was the Wife's attorney's affidavit detailing the accrual of QDRO preparation fees totaling one thousand four hundred eighty-eight dollars and eighty-nine cents ($1,488.89). The court entered its order on June 30, 2006, and found the fees to be reasonable, the QDRO to have been prepared for the benefit of Husband, and the equitable remedy to be an award to Wife of half the fees. In the order, the trial court stated that

> it is reasonable to assess fees inasmuch as the [QDRO] was directed in accordance with the parties' first Final Decree of Divorce (entered June 24, 2004) the property division provisions of which were set aside by the Court of Appeals and an Order was entered in April 5, 2006 resolving the property issues but which did not address the 401(k) benefits. Accordingly, the Court finds that it is equitable for Mr. Clark either to pay one-half (½) of the requested fees . . . or at his election, he may relinquish his interest in the [QDRO] order entirely.

From the order on remand, Husband appeals the division of marital property. From the above order, Husband challenges the lower court's award of attorney's fees.

Issues Presented and Standard of Review

On this second appeal, Husband raises three issues, as restated below:

(1) Whether the trial court erred on remand in changing the previously established value of marital real property;

(2) Whether the trial court erred on remand in ordering an inequitable division of the marital estate in favor of the Wife; and

(3) Whether the trial court erred on remand in ordering Husband to pay a portion of Wife's attorney's fees.

We review the trial court's findings of fact *de novo*, with a presumption of correctness. Tenn. R. App. P. 13(d); *Berryhill v. Rhodes*, 21 S.W.3d 188, 190 (Tenn. 2000). We will not reverse the trial court's factual findings unless they are contrary to the preponderance of the evidence. *Id*. Insofar as the trial court's determinations are based on its assessment of witness credibility, appellate courts will not reevaluate that assessment absent clear and convincing evidence to the contrary. *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Our review of the trial court's conclusions on matters of law, however, is *de novo* with no presumption of correctness. *Taylor v. Fezell*, 158 S.W.3d 352,

357 (Tenn. 2005). We likewise review the trial court's application of law to the facts *de novo*, with no presumption of correctness. *State v. Thacker*, 164 S.W.3d 208, 248 (Tenn. 2005).

Division of the Marital Estate

The Valuation of the Dutchman Property

Husband's first challenge on appeal pertains to the value assigned to the Dutchman property. He contends the lower court changed its value on remand by failing to deduct a hypothetical capital gains tax from the home's stipulated value of sixty-five thousand dollars ($65,000). In essence, he charges the court with inflating the value of this rental property so as to minimize the appearance of the allegedly inequitable division of assets. Husband presumes that the court established a value of thirty thousand dollars ($30,000) for the Dutchman property at trial and argues that, on remand, the valuation could not be disturbed because Wife had waived the issue by failing to challenge it at trial. We disagree.

First, there is no evidence that the court assigned a value lower than the stipulated amount of sixty-five thousand dollars ($65,000) in the first divorce proceeding. Although the previous opinion from the middle section of this Court indicated in dicta that the trial court valued the Dutchman property at thirty thousand dollars ($30,000), we must respectfully disagree with this account of events. *See Clark v. Clark*, M2004-01824-COA-R3-CV, 2005 WL 2230198, at *2 (Tenn. Ct. App. Sept. 13, 2005). In the first appeal, Husband challenged only the valuation of the vehicles and the classification of the Ridge Crest property. *Id.* Because he did not raise the issue of the trial court's valuation of the Dutchman property then, as he does now, the instant appeal compels us to distinguish between asset valuation and tax considerations under Tennessee law and to arrive at a different conclusion.

Although there was discussion of the effects of a capital gains tax at trial, nothing in the record supports Husband's allegation. In response to Husband's declaration that he had no interest in keeping the Dutchman property, the trial judge stated that she would order it sold and divide the after-tax profit between the parties. She commented, "[n]ow, if he wants to keep [the Dutchman property], let me know." Later, after the court awarded the Ridge Crest property to Wife, Husband changed his mind. Husband's counsel stated: "So Your Honor said that if he wants the house and the entire interest, he can keep the house, with the capital gain tax consequences, to let you know. Well, if that's going to be Your Honor's ruling, then he does want the rental property." The court then awarded the Dutchman property to Husband, commenting that the sale proceeds "would probably not be more than $15,000 each party after the capital gains is taken out, so if he wants it all and keep the capital gains, that's fine." The final decree of divorce reflected this award by declaring that Husband "shall be solely responsible for any Capital Gains tax that may be incurred upon a future sale thereof." Husband cites the judge's comments at trial as support for his valuation argument. We view this statement, however, as nothing more than speculation about potential tax effects rather than as a valuation of the property. It appears from the transcript that the trial judge was attempting to compare the results of two possible dispositions: either the sale and post-tax

division of proceeds, or the Husband's retention of all interest in the property and potential obligation to pay capital gains taxes.[5] In any event, the fair market value of a marital asset is separate and distinct from the tax implications of its sale.

The tax effects associated with a particular asset can become relevant when the court divides the marital estate, but not when it assigns values to the respective marital assets. Husband erroneously conflates two independent steps necessary for the equitable division of marital property. Generally, after the court has classified the parties' assets, it then must assign a reasonable value for each asset subject to division. Tenn. Code Ann. § 36-4-121(b)(1)(A) (2005). The Code requires that marital property be "valued as of a date as near as reasonably possible to the final divorce hearing date." Tenn. Code Ann. § 36-4-121(b)(1)(A); *Dunlap v. Dunlap,* 996 S.W.2d 803, 817 (Tenn. Ct. App. 1998). After assigning values to the marital assets, the trial court then undertakes to divide the assets between the parties in an equitable fashion. The Code provides a list of factors that courts must consider when dividing marital property, including "[t]he tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset." Tenn. Code Ann. § 36-4-121(c)(9)(2005). The lower court did not, nor should it, incorporate tax consequences into a calculation of the Dutchman property's market value. Furthermore, the parties stipulated to the value before trial.

We thus view Husband's argument as challenging the court's decision not to alter the division of marital property because of the potential tax consequences. Yet, the tax consequences in this case prove so speculative and unsupported in the record that Husband cannot insist upon a specific tax amount for consideration. Indeed, at trial, counsel for Husband stated that "[w]ith regard to the capital gains tax consequences, the only way we are going to know is if this property is sold." Even though they testified to potentially high capital gains taxes, neither Husband nor Wife introduced other evidence pertaining to the taxes. The trial court's order on remand reflected this reality when it declined to factor capital gains taxes into the property division because there was "no competent proof thereof at trial."

Husband complains that the trial court refused to hear evidence pertaining to the tax consequences on remand. He merely argues as follows:

> At the remand hearing, the trial court, at Wife's request, refused to allow any additional proof, although the Court changed the value it previously assigned to the [Dutchman property] awarded to Husband at the request of Wife's attorney. At the remand hearing, the trial court [assigned a value of $65,000 to the property] with no

[5] We note that the consideration of tax consequences for the purposes of property division serves another function besides impacting how much property each party should receive. It also serves to assist courts in ordering the disposition of the assets themselves. *See, e.g., Elam v. Elam*, No. 02A01-9812-CH-00362, 1999 WL 669847, at *3 (Tenn. Ct. App. Aug. 30, 1999)(*no perm. app. filed*). Ordering the sale of a property that will incur substantial taxes and fees only reduces the overall marital estate. On the other hand, when the parties have great need for liquid assets, sometimes such a sale becomes necessary. In this case, the Dutchman property generated rental income. In 2003, Wife reported gross receipts of approximately twelve thousand dollars ($12,000).

consideration being given to the capital gains tax consequences testified to by both of the parties and found by the court at the original trial.

[Wife waived her opportunity to challenge this value and is now bound by it.]"[6]

As previously determined, we find nothing in the record to support a change in valuation. And, although Wife testified that the capital gains taxes would be high upon the sale of the property, there was no testimony as to specific tax amounts or expert testimony as to potential tax liabilities. Acknowledging the general effect of capital gains taxes, the trial court gave Husband the choice of an ordered sale of the property and equal division of the proceeds or of an award of complete interest in the property to him. Husband chose to retain the property.

As the party relying on tax consequences, Husband bore the burden of introducing competent proof on the subject but failed to do so. *Cf. Kinard v. Kinard*, 986 S.W.2d 220, 231 (Tenn. Ct. App. 1998)(discussing burden of proof on the issue of asset valuation). Even assuming that Husband could have properly introduced new evidence of the tax consequences on remand, there is nothing in the record to support a finding of error. First, the statement of evidence does not indicate that the trial court refused to hear new evidence on the tax consequences. And, second, it is unclear (at best) whether Husband stood ready to offer new evidence at that time. There is no indication that he attempted to make an offer of proof in light of the court's alleged limitation on remand. Nor does the statement of evidence even touch on the issue of tax consequences. Indeed, pursuant to Tennessee Rule of Appellate Procedure 24(c), Husband, as the Appellant, was required to prepare and submit a statement of evidence or proceedings to facilitate appellate review in the absence of a transcript. *See* Tenn. R. App. P. 24(c). The record indicates that Wife, not Husband, submitted the statement. Further, the Tennessee Rules of Appellate Procedure allow an appellee to challenge this filing upon detecting errors or omissions in the statement. *See* Tenn. R. App. P. 24(e). Husband did not even take this measure. Without more, we can identify no error.

We cannot agree with Husband's arguments regarding the Dutchman property for the following reasons. The trial court's order on remand does not reflect an increased asset value; rather, it represents a value to which both parties stipulated at trial. The trial judge's comments reflect little more than speculation about the potential tax consequences if she had ordered the property sold. Because such considerations become relevant during the court's division of marital property and do not impact asset valuation, the trial court properly addressed the issue of tax consequences on remand. Moreover, Husband chose to retain the Dutchman property and presented no competent proof of adverse tax consequences. Moreover, even if he stood ready to introduce such evidence at the remand hearing, he failed to preserve any error involving the court's alleged refusal to allow further proof. To the extent the trial court factored tax consequences into its original division of marital assets (whether in error or not), this fact did not constrain the trial court's exercise of

[6]On appeal, Husband also advances a waiver argument to this effect. Our finding that the trial court never established a thirty thousand-dollar ($30,000) value for the Dutchman property pretermits the need to address Husband's contention.

discretion on remand. Finding no error in valuation, we now consider whether the lower court equitably divided the marital estate.

Application of the Factors

After the trial court classifies and values each asset, it then must divide the marital estate in an equitable manner. Tenn. Code Ann. § 36-4-121(a)(1); *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *7 (Tenn. Ct. App. Sept. 1, 2006)(*no perm. app. filed*); *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). To do so, it must consider and weigh very carefully the relevant statutory factors set forth in section 36-4-121(c) of the Tennessee Code.[7] Although we presume that marital property is owned equally, *Bookout v. Bookout*, 954 S.W.2d 730, 731 (Tenn. Ct. App. 1997), an equitable division of the marital estate does not necessarily mean a precisely equal one. *Robertson v. Robertson,* 76 S.W.3d 337, 341 (Tenn. 2002); *Fox*, 2006 WL 2535407, at *7; *Batson*, 769 S.W.2d at 859. A fair division of marital property is evident in its final results. *Fox*, 2006 WL 2535407, at *7 (citing *Altman v. Altman*, 181 S.W.3d 676, 683 (Tenn. Ct. App. 2005)). Trial courts are vested with a great deal of discretion when classifying and dividing the marital estate, and their decisions are entitled to great weight on appeal. *Sullivan v. Sullivan*, 107 S.W.3d 507, 512 (Tenn. Ct. App.2002). Accordingly, unless the court's decision is contrary to the preponderance of the evidence or is based on an error of law, we will not interfere with the decision on appeal. *Id.*

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[7] This section of the Code provides as follows:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

(1) The duration of the marriage;

(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;

(4) The relative ability of each party for future acquisitions of capital assets and income;

(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

(6) The value of the separate property of each party;

(7) The estate of each party at the time of the marriage;

(8) The economic circumstances of each party at the time the division of property is to become effective;

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

(10) The amount of social security benefits available to each spouse; and

(11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c) (2005)

Based on our review of the record, we cannot say the evidence preponderates against the trial court's division of marital property. At the outset, we note that Husband received approximately forty-two percent (42%) of the marital estate, while Wife received fifty-eight percent (58%) of it. The record reflects that Wife is in a relatively better position to acquire further assets and generate income than is Husband. Moreover, Husband's economic circumstances at the time of property division were significantly less stable than those of Wife. Yet, there is abundant support in the record that Husband is young, healthy, and, according to the trial judge, "grossly underemployed." The fifth factor appears to be the most significant in this case:

> The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role.

Tenn. Code Ann. § 36-4-121(c)(5) (2005).

On balance, Wife's contributions to the marriage have eclipsed Husband's more modest ones. For the last half of the Clarks' almost thirteen-year marriage, Wife was the primary breadwinner, earning on average sixty thousand dollars ($60,000) per year. Husband, on the other hand, attempted to start various businesses, all of which recorded losses on tax returns spanning from 1999 through 2002, and which operated for short durations of time. Although Husband testified that he stopped work to stay at home for their son's first three years of life, Wife testified that she did the laundry, bought the groceries, paid the bills, managed the family finances, cooked the meals, took their son to doctor and (later) dentist visits, performed half of the housecleaning tasks, and worked full time. Husband, on the other hand, mowed the yard, cooked from a "box" occasionally, and performed half of the housecleaning tasks. In 2002, the Clarks placed their son in day care so that Mr. Clark could focus on finding gainful employment. The most he earned from the job he secured was just over twelve thousand dollars ($12,000) per year. At the time of trial, Husband had been without a job for two months, had liquidated his IRA to pay for basic living expenses and attorney's fees, yet could not tell the judge where he had submitted job applications. Moreover, he testified to earning only eight thousand nine hundred dollars ($8,900) per year at the remand hearing in 2006. Considering that Husband earned over thirty thousand dollars ($30,000) in 1996 as a painter and that Wife has been the primary residential parent of their son, these figures indeed support the trial court's statement that Husband was grossly underemployed. Wife's testimony regarding Husband's efforts as a homemaker likewise weakened his claim of equal contribution to the marital estate. The trial judge stated, "I find her believable" when commenting on Wife's testimony regarding certain financial transactions. We can only presume that the judge found her to be a credible witness in general. The court's statement that Husband "was not a provider of any type" clearly rested upon credibility determinations that are uncontradicted in the record.

Other factors considered by the trial judge included the stream of income generated by the Dutchman property and not otherwise accounted for in the valuations, as well as Wife's status as the

primary residential parent of their son. These facts provide support for an award of the Dutchman property, an income-producing asset, to Husband, and of the Ridge Crest property to Wife, who oversaw and paid for its construction. Given the foregoing facts,[8] we are unable to conclude that the specter of capital gains taxes should have caused the trial court to alter the property division on remand.

Award of Attorney's Fees

On appeal, Husband also argues that the QDRO's simultaneous entry with the second order settled the issue and prevented Wife from reviving it at a later date. Wife contends that the court did not address QDRO issues on remand and was not referring to QDRO preparation fees in its second order, thus rendering it fair game for later treatment. After a careful review of the record, we conclude that the lower court erred in awarding to Wife half of the attorney's fees for the QDRO preparation.

First, this Court remanded the case only on the issue of property division. Relying upon the principle of judicial economy, our supreme court has recognized the power of appellate courts to limit remand orders. *Melton v. Melton*, No. M2003-01420-COA-R10-CV, 2004 WL 63437, at *4 (Tenn. Ct. App. Jan. 13, 2004), *perm. app. denied* (Tenn. June 14, 2004); *Hutchison v. State*, 118 S.W.3d 720, 734 (Tenn. Crim. App. 2003) (citing *Perkins v. Brown*, 177 S.W. 1158 (Tenn. 1915)). The Tennessee Supreme Court has also stated that "inferior courts must abide the orders, decrees and precedents of higher courts. . . . [Otherwise] [t]here would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions." *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976) (quoted in *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995)). And, as this Court has stated,

> [i]t is to the interest of all that there be a constraint on unnecessary litigation. Moreover, by remanding a case with limiting instructions when error exists as to only certain issues, the courts maintain the integrity of rulings previously made. Affording the trial court the latitude of [broadening the scope on remand] would present a likely conflict [with] the prior rulings of the trial court and this court. . . . It is for these and other meritorious reasons that appellate courts have the power to remand cases with limiting instructions to the trial courts.

Melton, 2004 WL 63437, at *5. By entertaining Wife's subsequent request for attorney's fees, the lower court acted in excess of its authority when it considered a previously settled issue outside its scope on remand.

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[8] In reviewing whether the division of a marital estate is equitable, appellate courts also consider the division of marital debt. *Fox v. Fox*, 2006 WL 2535407, at *8 n.15; *see Robertson v. Robertson*, 76 S.W.3d at 341. On remand, the court awarded the homes and vehicles with their encumbrances attached. In other words, each party assumed the debt accompanying whatever asset he or she received. As such, this opinion considers only the equity in the assets, or the difference between the asset's market value and its accompanying debt, in determining whether the lower court divided the property equitably. We do note, however, that Wife assumed the bulk of the marital debt.

Second, because the first decree of divorce provided that each party would pay its own attorney's fees and because Wife never challenged this provision, she cannot properly revisit the issue after the entry of the order on remand. One waives the right to appellate review concerning an issue that was not, but could have been, raised in a previous appeal. *See Melton,* 2004 WL 63437, at *3; *Bing v. Baptist Memorial Hospital-Union City,* 937 S.W.2d 922, 924 (Tenn. Ct. App. 1996). In this case, the issue of attorney's fees for QDRO preparation is not a new one. On the contrary, at the conclusion of trial, the trial court directed Wife's attorney to draft the order and the QDRO. Wife was on notice that her attorney would provide these services. Moreover, the fees accrued before the parties argued the first appeal. Further, neither party addresses why the fee provision in the final decree of divorce did not encompass the QDRO preparation fees. Its broad language clearly covers them. We see no reason to deviate from this provision, plainly stated in the court's first order and, we note, duly drafted by Wife's attorney. By the conclusion of trial, all parties were on notice of the required services and of the certain accrual of the fees, yet Wife failed to seek a special provision in the first order, to request that the fees be paid from the funds on deposit with the court, to argue for a subsequent modification, or even to attempt raising the issue in the first appeal. However equitable it may seem to require Husband to bear half the cost of the QDRO preparation, Wife waived her opportunity to request such a remedy.

For the foregoing reasons, we affirm the trial court's order dividing the marital estate on remand, reverse its order pertaining to attorney's fees for preparation of the QDRO, and remand the case for entry of judgment consistent with this opinion. Costs of this appeal are taxed one-half to Jennifer Dawn Clark and one-half to Troy Allen Clark, and his surety, for which execution shall issue if necessary.

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DAVID R. FARMER, JUDGE